

## FUNDAMENTAL ERROR REPORTER

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### Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

**31.13.c.fe.020 Fundamental error** is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show that the error was fundamental and prejudicial.

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 17–19 (2010) (defendant contended on appeal that trial court erred in admitting his statement that “things would have been different” if he had been awake when officer arrested him and that “the police were lucky that he was asleep”; because defendant did not object to that evidence at trial, court reviewed for fundamental error only; because these statements did not go to foundation of defendant's case, did not take from him right essential to his defense, and did not cause him prejudice, any error could not have been fundamental).

**31.13.c.fe.030** If the defendant **did not** object at trial, the appellate court will review only for **fundamental error**, and **will grant** relief if the defendant proves fundamental, prejudicial error.

*State v. Mason*, 225 Ariz. 323, 238 P.3d 134, ¶¶ 2–9 (Ct. App. 2010) (defendant claimed on appeal his convictions for two counts of aggravated assault violated prohibition against double jeopardy; because defendant did not object at trial, appellate court reviewed for fundamental error; court stated “a double jeopardy violation constitutes fundamental, prejudicial error”; one count alleged accomplice beat victim with police baton, and other count alleged accomplice beat victim with baseball bat; court held these two acts constituted one assault, thus defendant's convictions for these two counts violated prohibition against double jeopardy; court vacated second conviction).

**31.13.c.fe.050** If the defendant **did not** object at trial to a **trial procedure**, the appellate court will review only for **fundamental error**, and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

*State v. Lynch*, 225 Ariz. 27, 234 P.3d 595, ¶¶ 19–20 (2010) (defendant contended on appeal that, during voir dire of first jury panel, trial court should have given them details of what aggravating and mitigating circumstances might entail or how juror would factor such information into penalty decision; because defendant did not object at trial, court reviewed for fundamental error only; because first jury was not able to reach unanimous verdict on penalty and trial court had to impanel second jury, court held defendant failed to prove any error).

*State v. Lynch*, 225 Ariz. 27, 234 P.3d 595, ¶¶ 35–38 (2010) (defendant contended on appeal trial court erred in telling jurors about specific facts of case; because defendant did not object at trial, court reviewed for fundamental error only; because juror stated she was Catholic and did not believe in death penalty, but would “go against” those views in case involving children, trial court did not err in advising her (and other jurors) that case did not involve children).

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 27–32 (2010) (defendant contended on appeal indictment was duplicative (duplicitous) because it named three victims of robbery and erroneous because it alleged robbery of restaurant; because defendant did not object at trial, court reviewed for fundamental error only; court held defendant failed to prove any error was fundamental).

*State v. Garcia*, 224 Ariz. 1, 226 P.3d 370, ¶¶ 28–31 (2010) (during aggravation phase, juror told trial court that, 2 to 3 weeks earlier, Hispanic man had asked her if he could do yard work for her and she said “no,” and day before aggravation phase began, very similar looking Hispanic man appeared at her house and asked if she wanted to sell her SUV, and during conversation, another SUV with woman inside was parked in front of her house, and as man walked away, woman made references to Jeffrey Dahmer; on first day of aggravation phase, juror noticed woman who was part of defendant’s family and thought it was same woman she had seen in SUV, and thus thought members of defendant’s family had improperly contacted her; defendant moved for mistrial of aggravation phase, which trial court granted, but did not move for mistrial of guilt phase; on appeal, defendant contended trial court should have declared mistrial of guilty phase on its own; because defendant did not object at trial, court reviewed for fundamental error only, and held that, because there was no showing juror knew of any problem until aggravation phase, defendant was not entitled to relief).

*State v. Garcia*, 224 Ariz. 1, 226 P.3d 370, ¶¶ 84–87 (2010) (on appeal, defendant contended trial court erred in refusing jurors’ request to review exhibit, which was co-defendant’s plea agreement; because defendant did not object at trial, court reviewed for fundamental error only; because jurors had sufficient evidence showing co-defendant had entered pleas to various crimes and had made non-death penalty plea deals, defendant was not able to show prejudice).

*State v. Diaz*, 223 Ariz. 358, 224 P.3d 174, ¶¶ 11–17 (2010) (trial court impaneled 15 jurors; at close of case, trial court excused three jurors and told jurors that “[a]ll 12 of you must agree on a verdict”; at point when jurors reconvened next day, record was silent on whether all 12 jurors were present; when jurors returned their verdict, trial court noted “the presence of the jury” and *sua sponte* polled jurors; transcript, however, only contained names of 11 jurors; after court of appeals issued its opinion reversing conviction, court reporter submitted revised transcript showing all 12 jurors were polled; court noted three standards of review, structural error, harmless error, and fundamental error, and that defendant must first establish some error, and held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error).

*State v. Maldonado*, 223 Ariz. 309, 223 P.3d 653, ¶¶ 25–26 (2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded that Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

*State v. Davis*, 226 Ariz. 97, 244 P.3d 101, ¶¶ 9–20 (Ct. App. 2010) (defendant contended trial court abused discretion by limiting closing arguments to 8 minutes; because defendant did not object at trial, court reviewed for fundamental error; court concluded that, because defendant may not have objected for strategic reasons in that state had burden of proof, and because trial court stated attorneys had covered all necessary points, defendant did not sustain burden of establishing alleged error was fundamental).

*State v. Ray*, 226 Ariz. 54, 243 P.3d 1036, ¶¶ 12–14 (Ct. App. 2010) (defendant contended allowing trial court in criminal proceeding to determine amount of defendant's liability for expenses incurred as result of arson defendant caused violated his due process rights to have jurors determine amount of liability; because defendant did not raise this issue at trial, court reviewed for fundamental error; court held defendant failed to prove procedure resulted in any error).

*State v. Rogers*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶¶ 1–9 (Ct. App. 2010) (defendant contended trial court erred in imposing \$75.00 surcharge pursuant to A.R.S. § 16–954(C); because defendant did not raise issue with trial court, court reviewed for fundamental error only; court held trial court should have assessed defendant even more than it did, so defendant was not prejudiced).

*State v. Martin*, 225 Ariz. 162, 235 P.3d 1045, ¶¶ 13–15 (Ct. App. 2010) (trial court ruled videotape of forensic interview of 5-year-old victim was recorded recollection and played it to jurors during trial over defendant's objection; in response to question from jurors, trial court and parties agreed jurors would be able to review videotape during deliberations; on appeal, defendant contended trial court erred in allowing videotape to be admitted in evidence and making it available to jurors during deliberations; because defendant did not object at trial, court reviewed for fundamental error only; court held defendant failed to prove jurors reviewed videotape during deliberations, and further held that, even if jurors did view videotape during deliberations, other evidence supported his conviction, thus defendant failed to establish prejudice).

**31.13.c.fe.060** If the defendant **did not** object at trial to the admission or exclusion of **evidence**, the appellate court will review only for **fundamental error**, and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

*State v. Chappell*, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 8–10 (2010) (2-year-old victim died by drowning in swimming pool; on appeal, defendant contended his statements about murder should have been excluded because state failed to prove *corpus delicti*; because defendant did not object to admission of his statements at trial, court reviewed for fundamental error only; court held following evidence corroborated defendant's statements: Several days before victim's death, defendant was seen inspecting swimming pool area at apartment complex where victim and his mother lived; rock similar to rocks found near defendant's parents' house was used to prop open pool gate; mother routinely locked apartment door at night, making it unlikely victim could have opened door himself; at one time, defendant had key to mother's apartment; and victim's body was found in pre-dawn hours in pool located some distance from mother's apartment; court held this corroborating evidence made it very unlikely victim's death was accident; court found no error, fundamental or otherwise).

*State v. Womble*, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (detective testified that jail informant told him about defendant and that he used that information to get court order to listen to telephone calls; although defendant objected on basis of hearsay, because defendant did not object on basis of Confrontation Clause violation, court reviewed for fundamental error only; because detective testified only about defendant’s existence and not about substance of what informant said, testimony did not violate Confrontation Clause).

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 13–14 (2010) (defendant contended on appeal that trial court erred in admitting evidence that defendant and codefendant had formed paramilitary group that asserted supremacy of white race and espoused negative views of racial minorities; because defendant did not object to that evidence at trial, court reviewed for fundamental error only; because victims were members of minority groups, evidence was relevant to show defendant’s motive in killing victims, thus no error).

*State v. Herrera*, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 5–16 (Ct. App. 2010) (state’s expert testified in general about child molest victims and about false allegations; defendant contended trial court erred in allowing witness to testify about numbers and percentages in response to juror questions; because defendant did not object to that evidence at trial, court reviewed for fundamental error only; because expert did not testify about particular victim in case and had no knowledge about facts of case, and did not tell jurors who is telling truth and who is lying, and because there was ample evidence of defendant’s guilt, and because jurors acquitted him of two of six counts, court found defendant failed to establish fundamental, prejudicial error).

*State v. Kinney*, 225 Ariz. 550, 241 P.3d 914, ¶¶ 6–26 (Ct. App. 2010) (defendant made statements both at scene of arrest and at police station; at trial, defendant moved to suppress statements and evidence police obtained at scene of arrest, but did not move to suppress statement he made at police station, which was he had prior conviction; for that statement, his only contention was its probative value was substantially outweighed by danger of unfair prejudice; because defendant did not object at trial on basis that obtaining statement at police station violated his constitutional rights, court reviewed for fundamental error only; court noted state presented sufficient evidence at trial to prove defendant had prior conviction, so defendant failed to prove prejudice in admitting his statement that he had prior conviction).

*State v. Damper*, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 6–13 (Ct. App. 2010) (throughout morning, defendant and girlfriend (C.) argued because C. did not want defendant to go to MLK Day event because she worried defendant’s ex-girlfriend might be there and because she feared violence might break out at event; at 11:21 a.m., C’s friend B. received text message from C’s cell phone that said, “Can you come over; me and Marcus [defendant] are fighting and I have no gas”; shortly after that, defendant’s roommate heard gunshot; defendant told roommate C. had been shot; at trial, defendant claimed shooting was accidental; trial court admitted text message; on appeal, defendant contended admission of text message violated his Sixth Amendment right of confrontation; because defendant did not object at trial, court reviewed for fundamental error only; because nothing indicated C. intended text message might later be used in prosecution or at trial, court concluded text message was not testimonial, thus no Sixth Amendment violation).

**31.13.c.fe.070** If the defendant **did not** object at trial to the giving or the refusal to give a **jury instruction**, the appellate court will review only for **fundamental error**, and **will not grant relief** if the defendant fails to prove fundamental, prejudicial error.

*State v. Womble*, 225 Ariz. 91, 235 P.3d 244, ¶¶ x–xx (2010) (defendant contended trial court erred in instructing jurors at aggravation and penalty phases that defendant eventually could be released if given life sentence; because defendant did not object to that jury instruction at trial, court reviewed for fundamental error only; court noted that, at time of defendant's sentencing, if he received life sentence, he would be eligible for release after 25 years, thus defendant's contention that he could never be released was merely speculative).

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 23–26 (2010) (defendant contended on appeal trial court erred in instructing jurors they could consider evidence of guns and ammunition found at defendant's campsite as demonstrating defendant had character trait that predisposed him to commit crimes; because defendant did not object to that jury instruction at trial, court reviewed for fundamental error only; court held that, because that erroneous instruction did not deny defendant fair trial or take from him right essential to his defense, error was not fundamental).

*State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 37–39 (2010) (defendant contended on appeal that trial court erred in not instructing jurors on unlawful imprisonment as lesser-included offense of kidnapping; because defendant did not request that jury instruction at trial, court reviewed for fundamental error only; because evidence showed defendant intended to aid in commission of robbery and knew victims might be harmed, defendant failed to demonstrate fundamental error).

*State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, ¶¶ 35–39 (2010) (on appeal, defendant contended trial court should have given additional instruction that, if jurors could not agree, trial court would give further instructions; because defendant never asked trial court to give that instruction, court reviewed for fundamental error, and found no error).

*State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, ¶¶ 51–55 (2010) (during guilt and aggravation phases, trial court instructed jurors not to be influenced by sympathy; during penalty phase, trial court instructed jurors not to be swayed by sympathy not related to evidence presented during penalty phase; on appeal, defendant contended trial court erred because jurors may have relied on guilt and aggravation phase instruction during penalty phase; because defendant did not object at trial, court reviewed for fundamental error only, and because jurors were presumed to follow instructions, found no error).

*State v. Herrera*, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 26–28 (Ct. App. 2010) (because trial court found other acts evidence was admissible as intrinsic evidence, defendant contended trial court erred in giving propensity instruction; because defendant did not object to that jury instruction at trial, court reviewed for fundamental error only; because (1) defendant mentioned evidence as demonstrative of sexually aberrant propensity in opening statement and closing argument, (2) evidence could have been admitted under Rule 404(c), (3) trial court instructed jurors not to use other act evidence as basis for conviction of charges, and (4) jurors convicted defendant of only four of six charges, defendant failed to demonstrate fundamental, prejudicial error).

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶¶ 21–28 (Ct. App. 2010) (defendant contended portion of second-degree murder instruction was erroneous; because defendant did not object to that jury instruction at trial, court reviewed for fundamental error only; court stated that portion of instruction was unnecessary and arguably inadvisable, but that instructions taken as whole correctly instructed jurors, so there was no error fundamental or otherwise).

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶¶ 29–32 (Ct. App. 2010) (defendant contended heat-of-passion manslaughter is not lesser-included offense of second-degree murder, thus trial court erred in giving *LeBlanc* instruction for those offenses; because defendant did not object to that jury instruction at trial, court reviewed for fundamental error only; court stated point defendant raised was “academically interesting and may warrant further clarification by our supreme court,” but because jurors were aware from other instructions and arguments of counsel under what circumstances defendant would be guilty of manslaughter, instruction did not result in prejudice).

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶¶ 34–37 (Ct. App. 2010) (because jurors convicted defendant of second-degree murder, defendant was not prejudiced by any defects in manslaughter instruction).

**31.13.c.fe.080** If the defendant **did not** object to the trial court about the **sentence** or the **sentencing procedure**, including the validity of any prior conviction alleged, the defendant waives any error on appeal, and the appellate court may review the claim only for **fundamental error**.

*State v. Mason*, 225 Ariz. 323, 238 P.3d 134, ¶¶ 2–9 (Ct. App. 2010) (defendant claimed on appeal his consecutive sentences for aggravated assault and armed robbery violated provisions of A.R.S. § 13–116; because defendant did not object at trial, appellate court reviewed for fundamental error; court held, based on facts of case, that consecutive sentences were permissible, thus no error).

**31.13.c.fe.090** If the state **did not** raise an issue at trial, the appellate court will review only for **fundamental error**.

*State v. Garcia-Navarro*, 224 Ariz. 38, 226 P.3d 407, ¶¶ 4–5 (Ct. App. 2010) (at trial, defendant claimed border patrol agent did not have reasonable suspicion to stop his vehicle; trial court granted defendant’s motion to suppress; on appeal, state contended border patrol agent was acting as private citizen, thus Fourth Amendment did not apply; because state did not present that argument to trial court, appellate court would review that argument for fundamental error only, and found no error in trial court’s ruling).

#### **Rule 31.13(c) Appellate briefs—Contents—Harmless error.**

**31.13.c.he.010** When a defendant **did** object at trial and thereby preserved an issue for appeal, if the appellate court concludes there was error, the court will reverse unless the state proves beyond a reasonable doubt the error did not contribute to or affect the verdict or sentence.

*State v. Machado*, 224 Ariz. 343, 230 P.3d 1158, ¶ 65 (Ct. App. 2010) (because defendant presented to trial court all evidentiary argument he made on appeal, and because court concluded trial court erred in precluding certain evidence defendant wanted admitted, and because court could not conclude beyond reasonable doubt error did not contribute to or affect verdict, defendant was entitled to new trial).

**31.13.c.he.020** When a defendant **did** object at trial and thereby preserved an issue for appeal, if the appellate court concludes there was error, the court will not reverse if the state proves beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶¶ 18–20 (Ct. App. 2010) (court held trial court should have stricken for cause prospective juror who was sheriff's deputy and was employed by same sheriff's department that investigated case; defendant contended he was prejudiced because use of peremptory strike prevented him from striking another prospective juror who worked as engineer and had rendered guilty verdict in another case; court stated those details may have made that prospective juror less appealing to defendant, but in no way suggested that prospective juror was biased or could not serve as fair and impartial juror, thus because defendant did not articulate anything beyond mere speculation how trial court's error affected outcome of case, court found error harmless).

*State v. Simmons*, 225 Ariz. 454, 240 P.3d 279, ¶ 14 (Ct. App. 2010) (defendant was charged with driving under influence while her driver's license or privilege to drive was suspended, canceled, or revoked; court held this applied to driver's license or privilege to drive whether in Arizona or in any other state; evidence showed defendant's W.Va. license was "expired" and not suspended, canceled, or revoked, but that her privilege to drive in North Carolina was revoked at time of offense, and defendant did not challenge that finding; court held that, even if trial court was incorrect in basing conviction on defendant's status in W.Va., defendant's status in N.C. supported conviction, thus any error would have been harmless).

*State v. Hatch*, 225 Ariz. 409, 239 P.3d 432, ¶ 15 (Ct. App. 2010) (trial court allowed defendant to be impeached with conviction for possession of drug paraphernalia; even if this were error, because defendant admitted elements of crime for which he was convicted, any error would have been harmless).

#### **Rule 31.13(c) Appellate briefs—Contents—Structural error.**

**31.13.c.se.060** Neither Rule 6.5(a), which requires the trial court to enter an order when it appoints counsel, nor Rule 6.8(b), which sets forth the qualifications for lead and co-counsel in a capital case, requires the trial court to make a finding that a capital defendant has been appointed qualified counsel, thus failure to make such a finding is not structural error, and to the extent a defendant contends trial counsel was not effective, the defendant must raise that claim in a petition for post-conviction relief.

*State v. Snelling*, 225 Ariz. 182, 236 P.3d 409, ¶¶ 13–14 (2010) (defendant contended that, because trial court did not expressly determine that qualified capital defense team had been appointed for him, trial court committed structural error; court held neither Rule 6.5(a) nor Rule 6.8(b) required trial court to make such finding; and defendant would have to raise any claim of ineffectiveness in petition for post-conviction relief).

#### **Rule 31.13(c) Appellate briefs—Contents—Appellate review.**

**31.13.c.ar.050** Because the appellant is required to brief and argue **on appeal** all issues in the opening brief, and because Rule 31.13(c)(3) limits the reply brief to matters raised in the answering brief, the appellate court will not consider an issue the appellant raises for the first time in a **reply brief**.

*State v. Linder*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶ 3 n.1 (Ct. App. 2010) (in reply brief, defendant contended A.R.S. § 28-1323(C) was unconstitutional because it (1) violates of presumption of innocence by creating impermissible conclusive presumption that defendant BAC is what Intoxilyzer says it is, (2) violates Equal Protection Clause because it grants out-of-state forensic witness legal immunity from state court's power, and (3) violates separation of powers by usurping judiciary's authority; court held defendant waived these arguments by not making them in opening brief).

*State v. Rumsey*, 225 Ariz. 374, 238 P.3d 642, ¶ 15 n.4 (Ct. App. 2010) (defendant was arrested for DUI and given blood test; in her reply brief, defendant noted there was 5-hour delay between accident and time she received her independent blood test, and "[t]here was therefore no evidence that the independent blood draw was obtained before the evidence had vanished"; court stated that, to extent defendant was arguing delay in obtaining independent blood test deprived her of right to collect exculpatory evidence, because defendant raised this contention for first time in reply brief and failed to provide any relevant argument or citation to authority, court considered this argument waived).

**31.13.c.ar.080** If a party raises a claim at trial but does not raise it in the appellate brief **on appeal**, or raises a claim of error in the appellate brief but does not argue it and include appropriate references to the record, or raises a claim of error in a footnote to the brief rather than in the body of the brief, the appellate court will consider the claim abandoned.

*State v. Eddington*, 226 Ariz. 72, 244 P.3d 76, ¶ 33 (Ct. App. 2010) (court stated defendant's failure to support his prejudice argument in opening brief with citations to record provided independent ground to reject defendant's claim).

*State v. Linder*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶ 3 n.1 (Ct. App. 2010) (in municipal court and on appeal to superior court, defendant argued he had due process right to discover source code for Intoxilyzer, and that A.R.S. § 28-1323(C) violated Privileges and Immunities Clause; court noted defendant failed to make these arguments on appeal and thus considered them waived).

*State v. Henry*, 224 Ariz. 164, 228 P.3d 900, ¶ 27 (Ct. App. 2010) (defendant merely cited Fifth Amendment to United States Constitution and Article 2, Section 10 of the Arizona Constitution, but failed to develop argument in opening brief that registration requirement for sex offenders violated provisions against double jeopardy, so court did not address that issue).

**31.13.c.ar.090** If a party raises a claim at trial but does not raise that claim in the appellate brief **on appeal**, although such a claim is usually considered abandoned and waived on appeal, the appellate court has discretion to consider such a claim.

*State v. West*, 224 Ariz. 575, 233 P.3d 1154, ¶¶ 9-11 (Ct. App. 2010) (after trial court denied defendants' Rule 20 motions both at end of state's case and after presentation of all evidence and jurors returned guilty verdicts, trial court granted defendants' renewed Rule 20 motion; although state made argument to trial court based on *State ex rel. Hyder v. Superior Ct. (Clifton)*, 128 Ariz. 216, 624 P.2d 1264 (1981), it did not make that argument to appellate court; because that case was dispositive of issue presented to appellate court, that court ordered parties to brief issue of state's abandonment of issue and merits of issue, and considered those issues).

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